APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

United States of America	)	
	)	Criminal
v.	)	Action
	)	No. 13,217
Charlie Graham Gregory and	)	
Paul Walter Pearce	)	

MEMORANDUM

Defendants were indicted for possession and removal of non-tax-paid distilled spirits in violation of 26 U.S.C.A., Sections 5601 (a) (12), 5205 (a) (2), and 5604 (a) (1). The case now stands on a motion to suppress certain evidence (illicit whiskey) obtained and seized by agents of the Alcohol and Tobacco Tax Unit (ATTU).

Beginning on August 1, 1966, William T. McFarland of the ATTU started receiving numerous phone calls in regard to the defendant Gregory who lived in Norfolk. These calls, about 12 in number, were all from the same unknown person who said that Gregory was operating a still on the Eastern Shore with two other named helpers and inquired as to the reason why he, Greg-

ory, was not arrested. These calls were received from August until November when the defendants were arrested. The caller also related to McFarland a description of the truck being used by Gregory—including its license number. An independent investigation by McFarland revealed that this particular truck was registered with the Virginia Division of Motor Vehicles to Paul Walter Pearce. Both Pearce and Gregory were known to McFarland as "violators," having previously been convicted in the United States District Court at Norfolk for whiskey violations. The circumstances relating to Gregory's continuous use of a truck registered in the name of Pearce, both being known whiskey violators were, standing alone, highly suspicious, even to the extent of supplying reasonable cause when the untested informant communications continued.

During this period from August 1, 1966, until November 9, 1966, when the arrest was made, Gregory was observed and trailed off and on by agents of the ATTU, and was observed in the Ford pickup in the vicinity of a suspected still site on the Eastern Shore.

About one month before the arrest, Earl W. Berge, another agent of the ATTU, received a tip from the vice squad of the Chesapeake Police (who in turn had received their information from an informer whose reliability was untested) concerning the defendant Gregory and his whiskey operations. The caller said that Gregory was making whiskey on the Eastern Shore and delivering it to Norfolk. Also, it was stated that Gregory was using a Ford pickup for hauling the whiskey and when this truck came through the Chesapeake Bay

Bridge-Tunnel loaded with produce, it would also be carrying illegal whiskey.

With this information in hand, McFarland went to the Chesapeake Bay Bridge-Tunnel Police and asked them to notify him when the truck in question went through the tunnel. On November 9, 1966, McFarland was called by the Tunnel Police and told that the truck was coming through the tunnel into Norfolk and was carrying produce. McFarland had other investigators begin following the truck from the Norfolk side of the tunnel. McFarland caught up with the truck at Providence Road on Military Highway and pulled in behind the truck. He recognized the two occupants as Gregory and Pearce. The red light and siren were turned on and defendants pulled over to the side of the road with McFarland pulling over behind them. At this time there was another car in front of the pickup with other ATTU investigators. Both defendants got out of the truck and met McFarland who was walking toward the truck. The three men talked for a moment, and McFarland looked at the produce on the rear of the truck. Pearce then began to run or walk rapidly away from the truck toward the woods and McFarland, thinking that he was trying to run away, followed and caught up with him. They returned to the truck. At this point McFarland went to the cab of the truck, opened the door and discovered the illegal whiskey on the floor alongside the front seat.

The issue involved here is one of probable cause; that is considering the totality of the circumstances, did McFarland act with probable cause in stopping the defendants. The question of whether probable cause existed must be determined only by the facts and circumstances

as they existed up until the time the defendants were stopped. Nothing that happened after the stopping can have any bearing on the issue. See *Potter* v. *United States*, 362 F. (2d) 493 (5 Cir., 1966).

A definition of probable cause has been set forth in the two leading cases of *Brinegar* v. *United States*, 338 U.S. 160 (1949); and *Carroll* v. *United States*, 267 U.S. 132 (1924).

> "Probable cause exists where the facts and circumstances within the officer's knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

See also *Beck* v. *Ohio*, 379 U.S. 89 (1964). The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. But it is quite clear that where the arresting officer acts *only* on the uncorroborated tip of an informer whom he does not know to be reliable, he does not have such a reasonable ground for belief of guilt. *Rodgers* v. *United States*, 267 F. (2d) 79 (9 Cir., 1959); *Contee* v. *United States*, 215 F. (2d) 324 (D.C. Cir., 1954).

In the instant case, the ATTU agents were initially alerted to Gregory's bootlegging operation by just such a tip—a tip from an unknown informer whose reliability was untested. They later received information from the Chesapeake Police that also was of questioned reliability since the source of this information was from an untested informer. Standing alone, this information would clearly be insufficient to establish probable cause. But there was

also present a substantial amount of corroboration observed personally by law enforcement officers. In dealing with these different items that corroborated the original information received from the informants it should first be noted that "Probable cause, however, can rest upon the collective knowledge of the police, rather than solely on that of the officer who actually makes the arrest," *United States* v. *Pitt,* 382 F.(2d) 322, (4 Cir., 1967). See also *United States* v. *Bianco,* 189 F.(2d) 716 (3 Cir., 1951). In considering the collective knowledge of the police, we must bear in mind that the required probable cause is the belief, reasonably arising out of circumstances known to the *seizing officer*—in this case McFarland—that the truck was being used for the illegal purpose of hauling whiskey. McFarland, as the officer stopping the truck, was not required to personally verify information coming from a member of the Vice Squad from the City of Chesapeake, even though the ultimate source of that information may have been an untested informer. This "collective knowledge" may be an accumulation of information coming into the hands of the enforcement authorities.

After receiving this first tip, McFarland, by his own investigation, found that the described Ford pickup was registered to Paul W. Pearce, a man known to McFarland as a violator of the whiskey laws. In addition, when the truck was placed under surveillance, it was found that, not only were frequent trips being made between Norfolk and the Eastern Shore, but also the truck while on the Eastern Shore was observed in the area of a suspected still site.

When the second tip from an informant was brought to McFarland's attention, this tended to corroborate the

information already at hand in that this informant named Gregory, stated that he was using a Ford pickup; and went on to describe how the operation was carried out. McFarland acted on this information and notified the Chesapeake Bay Bridge-Tunnel Police to inform him when the truck came through to Norfolk carrying produce.

Finally, when the Tunnel Police called and told McFarland that the truck was coming through with produce on it, and McFarland thereafter began following the truck on the Military Highway and recognized the occupants as the two defendants, he, McFarland, had personally verified all information that had been supplied by the informants, except whether or not the truck was actually carrying whiskey on that trip. With these numerous corroborating items on hand, it seems clear that, in stopping the defendants, McFarland was acting with probable cause as previously defined. See *Draper* v. *United States,* 358 U.S. 307 (1959); *Cavness* v. *United States,* 187 F.(2d) 719 (9 Cir., 1951); *United States* v. *Hopkins,* 263 F.(2d) 597 (7 Cir., 1959); *United States* v. *One 1957 Ford Custom Tudor,* 264 F.(2d) 682 (10 Cir., 1959); cf. *Henry* v. *United States,* 361 U.S. 98 (1959); *Rios* v. *United States,* 364 U.S. 253 (1960).

We agree, of course, as in *Carroll* v. *United States,* supra, that agents cannot stop every vehicle on the highway on the chance of finding liquor. We go further and say that merely because the driver and passenger in a vehicle are known to have been convicted of whiskey violations does not, standing alone, afford a basis for probable cause. However, it is clear that such fact, when aided by other information possessed by the arresting

officer, quickly supplies the evidence necessary for probable cause. *Ray* v. *United States,* 255 F.(2d) 473 (4 Cir., 1958); *Carroll* v. *United States,* supra; *Brinegar* v. *United States,* supra. As stated in *Brinegar,* "There was hearsay, but there was much more." While it may not be too unique a situation for a man living and presumably working on the Norfolk side of the Chesapeake Bay to occasionally travel to the Eastern Shore of Virginia, with the attendant tunnel expense and mileage, rather continuous trips in a truck registered in the name of another person known to be a whiskey violator and knowledge that such a person has been seen in the area of a suspected illegal distillery lends credence to the informant information which then, as in this case, furnishes the required reasonable cause to stop and search the vehicle.

Searches of automobiles that are constantly movable may make such search without a warrant a reasonable one, although the result might be the opposite in a search of a home, a store, or other fixed piece of property. *Cooper* v. *California,* 386 U.S. 58 (1967). We do not think, however, that the search can be questioned if the stopping of the truck was with reasonable cause. That the initial tip may have emanated from an unreliable informant(1) does not totally destroy the information received if, in fact, there be sufficient corroboration, before arrest, to justify a reasonable person, acting under the

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(1) At the trial it developed that Agent Berge of the ATTU had received information from Sgt. Thomas of the City of Chesapeake Vice Squad. The Court, desiring the record to be complete, suggested that Sgt. Thomas be called to testify. It was then ascertained that Gary Arnold Barnett of the Vice Squad had supplied this information (i.e., what the informant had told him) to Berge, but that the informant had not previously supplied information and the reliability was untested.

totality of the circumstances; in believing that a crime was being committed. *United States* v. *Irby,* 304 F.(2d) 280 (4 Cir., 1962); *Katz* v. *Peyton,* 334 F.(2d) 77 (4 Cir., 1964). We believe that the corroborating circumstances clearly justify such a finding and, therefore, the motion to suppress must be denied.

The issue of suppression is the only point in the case. Since the seized whiskey is properly admissible, the guilt of the defendants must follow. The pleas of ignorance as to the presence of the box containing whiskey with the necks of the jugs exposed, located between the driver (Gregory) and the passenger (Pearce) are rejected.

(SGD) WALTER E. HOFFMAN
United States District Judge

At Norfolk, Virginia
Deceber 5, 1967

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

United States of America	)	
	)	
v.	)	No.
	)	Cr. 13,217
Paul Walter Pearce	)	

JUDGMENT AND COMMITMENT OF ERROR

On this 29th day of December, 1967 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY and a finding of guilty of the offense of violation of Title 26, U.S.C.A., Sections 5601 (a) (12), 5205 (a) (2) and 5604 (a) (1) (Internal Revenue—Removing, Concealing and Possessing Distilled Spirits) as charged in two Counts in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS, unless sooner released by operation of law.

IT IS ORDERED that the Clerk deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/WALTER E. HOFFMAN
United States District Judge.

APPENDIX C

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12,091

UNITED STATES OF AMERICA,
Appellee,
versus
CHARLIE GRAHAM GREGORY,
Appellant.

No. 12,092

UNITED STATES OF AMERICA,
Appellee,
versus
PAUL WALTER PEARCE,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK WALTER E. HOFFMAN, CHIEF DISTRICT JUDGE.

(Argued May 10, 1968. Decided June 17, 1968.)

Before BOREMAN, BRYAN and BUTZNER, Circuit Judges.

Richard G. Brydges, (H. Calvin Spain, and Brydges,

Broyles & McKenry on brief) for Appellants, and James A. Oast, Jr., Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

PER CURIAM:

The appellants, Charlie Graham Gregory and Paul Walter Pearce, assign the same trial error in their convictions for removing, concealing and possessing tax-unpaid distilled spirits, 26 USC 5601 (a), 5205 (a) (2) and 5604 (a) (1): that is, the admission in evidence of the whiskey when without a search warrant it had been found and seized in an allegedly illegal search of the pickup truck occupied by the appellants on November 9, 1966, at Chesapeake, Virginia.

Aided by his discussion of the circumstances of the search and the law on the subject, we think with the District Judge that there was probable cause for the search, and that the liquor was rightly received as proof of the crime. With its receipt, there was evidence aplenty to convict and we affirm the judgments of guilt.

Affirmed.